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General Response

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General Response

Stephen J. Carlotti*

I will defer to my fellow panelists and not stand. I find it very difficult to do so because on my first day at the Yale Law School, Professor James William Moore called upon Walter Dillinger, who later became the Solicitor General of the United States, and when Dillinger did not stand up, Moore banged his fist on the desk and said, "Dillinger, you don't sound much like a lawyer but why don't you stand up and look like a lawyer." At least I will try to sound like a lawyer.

I want to begin by observing the power of language. We are here to discuss "merit selection." By describing Rhode Island's methodology for choosing judges as "merit selection," we are basically circumscribing our discussion. We are a country, at least historically, that believes that personal merit is critical to advancement. Achievement ought to come from merit and not from social status, race or gender. Describing the Rhode Island system as an "independent panel selection process" or something equivalent, however, loses the positive connotations associated with the term "merit," a term in this context which discourages thoughtful evaluation.

We need always to first look at the consequences, intended or otherwise, of any system of judicial selection. In Rhode Island, a consequence of the current system is that the appointing authority, whomever that might be, is fundamentally circumscribed by the list that he or she receives from the Judicial Nominating Commission. None of us in this room, I think, would argue that President Obama had every right to select and appoint

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Sonia Sotomayor as an Associate Justice of the United States Supreme Court, based in part, at least, on his belief that her judicial philosophy is consistent with his. Similarly, we would probably all agree that Joseph Alito is qualified to be a Supreme Court Associate Justice. We might not agree with his philosophy but nevertheless we as a country accept the proposition that the President has the right to make the selection of his choice.

However, in Rhode Island, the Governor is given a list. On that list may be no one with whom he agrees philosophically, and yet, from that list he must make the appointment. It should come as no surprise that governors do not like those kinds of limitations. Governors want flexibility. Thus, Governor Carcieri supported the five year look back rule. I would ask all of us to think about the fact that by adopting a process that circumscribes the appointing authority's ability to select, we are delegating to an unelected and potentially unrepresentative group the power to determine the universe of judicial appointees. This is undemocratic.

In any event, give me any system and give me people committed to appointing judges of competence and integrity, and we will get a good result. For example, the former Chief Justice of the Rhode Island Supreme Court was elected by the Grand Committee as an Associate Justice.¹ Virtually every lawyer in this room would agree that he was an excellent Justice, and subsequently Chief Justice, of the Supreme Court. He was elected by the General Assembly in Grand Committee, a process universally scorned. Positive results are a function of the people that we appoint and the manner in which they carry out their responsibilities.

Although my colleagues may disagree, the biggest single change in Rhode Island is not the creation of the Judicial Nominating Commission. The biggest change is the enactment of the "revolving door rule." When we adopted legislation which in effect provides that no elected or appointed official who has not served at least five years in public office can be appointed to the bench for at least one year after he or she has left office, we solved

1. Chief Justice Joseph R. Weisberger served twenty-two years on the Supreme Court of Rhode Island. He served as Chief Justice from March 1995 to February 2001.

a multitude of problems. There is no person more powerless than a former office holder. No one has to pay any attention to a former Speaker of the House. As a result, the possibility of judgeship candidates coming directly from elected or appointed office was eliminated.

Having served as the Chair of the Judicial Nominating Commission for approximately two years, I can tell you that this is in fact a neglected institution. Do you know what our office is? It is a conference room on the third floor of the Department of the Administration. We have no permanent staff. The Commission only functions because the chairman is usually a lawyer, and usually that chairman, through his firm, provides the assistance necessary to the Commission, which the State reimburses on a marginal basis. We have a ten thousand dollar budget, which hardly covers the Commission's advertising expenses. At various points in time we have been told by the Department of Administration to delay vacancy advertisements because the Commission had no money.

Beyond the foregoing lack of support, I believe that our system has in fact discouraged people from making application. I have talked to enough trial lawyers whom I believe would make very qualified judges, and they tell me they would never subject themselves to this system. And you can understand why. We have an enormously complex, but appropriate, application that requires the production of personal income tax returns for three years, a personal financial statement, and a list of all debts and obligations. The candidates must submit the application to nine people, none of whom the candidate may know. And while members of the Commission are bound legally by a confidentiality rule, the candidate can never be sure who has access to the Commission's files. The application ends up in a room to which each person who has ever been a member of the Commission has a key. Would you apply?

The Commission has been chastised for failing to publish the names of all applicants. We do not publish the names of the applicants because we believe that would further circumscribe the number of applicants. Imagine: you are a lawyer; you have a practice in Coventry, and you are out there every day trying to get clients. You put your name in to be a judge. Right away, people ask themselves whether you, as their lawyer, will be there for

them. Further, if you do not make the short list of candidates, clients or prospective clients will surely question your competence.

There is a cost to transparency and I want us all to recognize that cost because there must be a balance. As the Chairman of the Commission, I asked for an advisory opinion from the Attorney General on whether letters of recommendation were public documents. My friends over there from the Providence Journal wanted them all. I felt that to release such letters would discourage people who might write us with derogatory comments about applicants, being afraid that those comments would be made public and then they would have to pay the price. That is why I objected. It was not because I wanted to deprive the "Tower of Truth" on Fountain Street the right to provide information. I wanted to protect the integrity of the process and to attract the best applicants.

As we talk about redesigning the process, we should keep in mind the goal. The goal is to get the best and most qualified applicants. I am not sure that we are doing that. So I have a suggestion for you. I suggest that the Governor should select people whom he or she wants considered. This list of names should be sent to the Commission. The Commission's obligation would be to review the quality of the applicants, to rate them, and then provide the ratings to the Governor. When the Governor submits the name to the Senate, or the Senate and the House for confirmation in the case of a Supreme Court appointment, he or she would be required to provide the rating. That way, the Governor retains his or her right to make his or her fundamental choice, and yet at the same time we have a check on quality. I firmly believe that in a democracy the Governor ought to have the right to select people who share his or her philosophy.